RECORD
AND
BRIEFS

(2)

No. 10-803

Supreme Court, U.S.
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In the Supreme Court of the United States

DEL BANJO, *Petitioner*,

v.

VINCE CULLEN, Acting Warden of California State Prison, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to interval tolling between two superior court habeas petitions under *Carey v. Saffold*, 536 U.S. 214, 222-23 (2002) and *Evans v. Chavis*, 546 U.S. 189, 193 (2006), which held that tolling can apply to "intervals between a lower court decision and a filing of a new petition in a higher court" on the presumption that California's original writ system is sufficiently analogous to appellate review systems.

2. Whether the Ninth Circuit erred in concluding that petitioner was not entitled to interval tolling during a 146-day delay – almost five months – between two superior court habeas petitions, by relying in part on the state court's ruling that petitioner failed to exercise diligence in presenting the evidence supporting the second petition, and by determining that a California court therefore would not find the delay reasonable.

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STATEMENT OF THE CASE

A Los Angeles County jury convicted petitioner of kidnapping with intent to commit rape and/or sodomy and forcible sodomy. As to the sodomy count, the jury found that petitioner kidnapped the victim and the movement substantially increased the risk of harm over and above the level of risk inherent in the underlying offense. The trial court sentenced petitioner to twenty-five years to life in state prison.

On July 30, 2002, the California Court of Appeal affirmed the judgment on direct appeal. On August 20, 2002, the court of appeal made a minor modification to the opinion and denied petitioner's petition for rehearing. Petitioner filed a petition for review in the California Supreme Court. On October 16, 2002, the court denied review. The judgment became final on January 14, 2003. *See* S. Ct. R. 13.

On December 30, 2003, petitioner, through counsel, filed a habeas corpus petition in the Los Angeles County Superior Court ("first superior court petition"). The court denied two of the three claims but issued an order to show cause on the third claim. The court held an evidentiary hearing on that claim, but denied the petition on January 28, 2005. In denying the petition, the court found petitioner's key witness, Salvatorre Guletta, not credible. On February 4, 2005, petitioner filed a motion for reconsideration, which was denied on February 10, 2005.[1]

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[1] Since the district court and Ninth Circuit considered the motion for remand as part of the first superior court proceeding, references to the "first superior court petition" herein include the time from the date the first petition was filed until the date the motion for reconsideration was denied.

(continued...)

Approximately five months later, on July 6, 2005, petitioner filed a second habeas corpus petition in the Los Angeles County Superior Court ("second superior court petition"). In that second superior court petition, petitioner raised the same three claims he raised in his first superior court petition, but appended declarations from five new witnesses.

On July 27, 2005, the superior court issued its order on the petition. The court found that petitioner had failed to exercise diligence in presenting the allegedly new evidence, as follows:

> The Court has reviewed the second petition for habeas corpus filed by [Petitioner] on July 6, 2005.
>
> Petitioner's first habeas petition was filed on December 30, 2003[.] . . . [T]he Court's Order to Show Cause issued on June 3, 2004, and a prehearing conference was held on August 24, 2004. An evidentiary hearing was conducted on November 12, 2004, at which Petitioner called witnesses and was given []a full opportunity to present any an[d] all evidence related to his claims. The

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(...continued)
Respondent assumes for purposes of this opposition but does not concede that petitioner would be entitled to tolling for the six-day interval between the denial of the first petition and filing of the motion for reconsideration, *see Carey v. Saffold*, 536 U.S. 214, 222-23 (2002); *Evans v. Chavis*, 546 U.S. 189, 193 (2006), or the time the motion was pending in the superior court, *see Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006) (motion for rehearing of denial of Illinois state postconviction relief did not toll limitations period, either during the period authorized for filing such motion or until the motion was denied).

> parties filed post-hearing briefs on January 21, 2005.
>
> The second petition relies upon declaration[s] by people who live in the Southern California area and have been available for investigation, interview and testimony at all relevant times. These are matters that could have been and should have been presented during the extensive proceedings on the first habeas petition. Penal Code section 1475; *In re Clark* (1993) 5 Cal.4th 750, 767; see *In re Hochberg* (1970) 2 Cal.3d 870, 876.
>
> The second petition is essentially a motion for new trial based upon newly discovered evidence. See Penal Code section 1181(8). But with reasonable diligence Petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding. *People v. Miller* (1951) 37 Cal.2d 801, 807; *People v. Trujillo* (1977) 67 Cal.App.3rd 547, 556. A motion for new trial is subject to the court's reasonable discretion. *People v. Turner* (1994) 8 Cal.4th 137, 212. (Cert. Pet. App. at 35a-36a.)

A motion for new trial based on "newly discovered evidence" in California is governed by California Penal Code section 1181(8). Pursuant to that statute, a court may grant a new trial, as follows:

> [w]hen new evidence is discovered material to the defendant, and which he

> could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

Cal. Penal Code § 1181(8).

The superior court denied the petition as follows:

> In light of the decidedly negative views this court has expressed about Petitioner's evidence at the November habeas hearing [in connection with the first superior court petition filed on December 30, 2003], the c[o]urt will not exercise its discretion to order a new trial.
>
> The second petition for habeas corpus is denied.

(Cert. Pet. App. at 36a.)

On September 29, 2005, petitioner filed a habeas corpus petition in the California Court of Appeal. On April 11, 2006, the court summarily denied the petition. On May 18, 2006, petitioner filed a habeas corpus petition in the California Supreme Court. On March 21, 2007, the court summarily denied the petition.

On April 2, 2007, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California ("federal petition"). On June 27, 2007, respondent moved to dismiss the petition as untimely under § 2244(d).

On September 27, 2007, the magistrate judge filed a report recommending, among other things, that the federal petition be dismissed as untimely. The magistrate judge concluded that 349 days of the period of limitation had expired before petitioner filed his first superior court petition, leaving 15 days remaining. The court also found that tolling applied from the filing of the first petition until the denial of the motion for reconsideration, but that petitioner was not entitled to interval tolling between the denial of the reconsideration motion and the filing of the next superior court petition, because the second petition "trigger[ed] an entirely separate period of review[,]" and petitioner did not meet the 9th Circuit's exception to this general rule.[2] The court thus concluded that the remaining sixteen days expired during the approximately five-month interval between the reconsideration motion and second petition.

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[2] The Ninth Circuit permits interval tolling between state petitions that are not filed in ascending order and employs a two-part test to determine whether the interval will be tolled in that circumstance. Under the Ninth Circuit's exception, tolling applies when (1) the second petition or round of petitions is "limited to an elaboration of the facts" of the same claims; and (2) there is no unreasonable delay under California law. *King v. Roe*, 340 F.3d 821, 923 (9th Cir. 2003); *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003); *see Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003); *accord Banjo v. Ayers*, 614 F.3d 964, 968-69 (9th Cir. 2010).

On August 12, 2008, the district court issued a detailed reasoned order adopting the report to the extent it was consistent with its order. (Cert. Pet. App. at 12a-27a.) The district court found that the federal petition was untimely on several grounds: (1) the second superior court petition triggered a new round of review such that tolling did not apply between the first and second rounds; (2) the second superior court petition was "procedurally improper" in light of petitioner's lack of diligence; and (3) setting aside the second superior court petition, the 230-day interval between the first superior court petition (including the motion for reconsideration) and the court of appeal petition was unreasonable. (Cert. Pet. App. at 17a-23a.) In reaching the conclusion that the 230-day delay was unjustified, the court found "that Petitioner's counsel diligently undertook the investigation that led to the discovery of the three additional witnesses *after* the motion for reconsideration of the First Superior court Petition was denied" but "there [was] no reason that Petitioner's counsel could not have been diligent *before* the First Superior Court Petition was denied." (Cert. Pet. App. at 24a, emphasis in original.) The court explained:

> It was Guletta's information that led to the discovery of the three new witnesses. Guletta was known as a witness well before the First Superior Court Petition was ever filed. In fact, Guletta's declaration attached to the First Superior Court Petition was executed on October 3, 2002, three and a half months before AEDPA's statute of limitations began to run and over two years before the investigation leading to

> the new witnesses began. There is no reason why a diligent investigation of the same order as the one that led to the three new witnesses could not have begun before the motion for *reconsideration was denied.*

(Cert. Pet. App. at 24a-25a.) The court entered judgment dismissing the federal petition with prejudice as untimely.

Petitioner filed a timely notice of appeal and application for a certificate of appealability. On October 1, 2008, the district court granted a certificate of appealability on the issue whether petitioner was entitled to additional statutory tolling.

On June 17, 2010, in a published opinion, the Ninth Circuit affirmed the district court judgment dismissing the petition as untimely. *Banjo v. Ayers*, 614 F.3d 964, 971 (9th Cir. 2010). The Ninth Circuit rejected respondent's argument that the second superior court petition was not "properly filed" based on the superior court's finding that petitioner failed to exercise diligence in presenting the new witnesses in support of the second superior court petition. Rather, the Ninth Circuit concluded the following:

> Here, the superior court did not make a determination that Banjo's second petition was untimely. Rather, the court – treating the second petition as a motion for new trial – found that the new evidence could with reasonable diligence have been discovered earlier, *and thus denied relief.* California law provides that a new trial may be granted on the basis of new evidence, unless that evidence could have been found prior to trial in the exercise of

> reasonable diligence. Cal. Penal Code § 1181(8); *People v. Martinez*, 36 Cal.3d 816, 205 Cal.Rptr. 852, 685 P.2d 1203, 1205 (1984). Thus, while the superior court rejected the petition, it did not explicitly reject it as untimely filed. *See Artuz v. Bennett*, 531 U.S. 4, 10-11, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000) (distinguishing between timeliness, which is a condition to filing, and procedural bars, which are conditions to relief); *but cf. Saffold v. Newland*, 250 F.3d 1262, 1266-67 (9th Cir. 2000) (assuming that a California habeas petition denied "for lack of diligence" was a dismissal for untimeliness), *overruled on other grounds by Saffold*, 536 U.S. 214, 122 S. Ct. 2134.
>
> The state court's failure to explicitly decide whether a petition was untimely filed does not end our analysis. (Citations omitted.) We must instead engage in an inquiry as to whether California courts would have deemed the petition filed within a reasonable time. *Chavis*, 546 U.S. at 198, 126 S.Ct. 846. Here, they plainly would not have.

Banjo, 614 F.3d at 970.

Having found that the second superior court petition was properly filed, the Ninth Circuit then applied the two-part *King* test[3] to decide whether the

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[3] As explained in footnote 2, the second part of the *King* test asks whether the petitioner engaged in unreasonable delay pursuant to *Chavis* and *Saffold*. *King v. Roe*, 340 F.3d at 823; *see Carey v. Saffold*, 536 U.S. at 222; *Chavis*, 546 U.S. at 198.

interval between the two petitions was tolled. The court did not address the first part of the test but concluded that petitioner was not entitled to interval tolling during the five-month delay between the first and second superior court petitions because the delay would not have been considered "reasonable" by the California courts. The court relied in part on the superior court's finding that petitioner failed to act diligently in presenting the new witnesses in support of the second petition. *Id.* at 970. The court also rejected petitioner's attempt to justify the delay on the basis that he continued efforts to develop evidence to support the claims in the superior court. *Id.* at 970-71.

Significantly, in upholding the district court's determination that the federal petition was untimely, the Ninth Circuit never found that the second superior court petition, or any state petition, was procedurally barred or not "properly filed." *Compare Banjo*, 614 F.3d at 970 (concluding that state courts had not explicitly found second superior court petition was untimely filed and evaluating reasonableness of five-month interval between first and second superior court petitions) *with* Cert. Pet. at 19 (stating that Ninth Circuit found second superior court "petition was untimely (and hence, not 'properly filed')").

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner argues that certiorari should be granted to correct the Ninth Circuit's misapplication of an alleged "due diligence" state procedural bar as a condition to filing, in violation of *Artuz v. Bennett*, 531 U.S. 4 (2000). According to petitioner, this alleged ruling creates a circuit split on whether a procedural bar is a condition to filing that determines whether a petition was properly filed. Petitioner also argues that conditions to filing must be "firmly established" and "regularly followed." Petitioner further claims certiorari should be granted to correct the Ninth Circuit's alleged imposition of an irrebuttable presumption of correctness for a state court's finding of lack of diligence, which petitioner asserts involves a misapplication of *Saffold*.

Certiorari is unwarranted for several reasons. First, contrary to petitioner's allegation, the Ninth Circuit did not find that the second superior court petition was not "properly filed." Nor did the Ninth Circuit find that the superior court had applied a so-called "due diligence" procedural bar. Indeed, there is no freestanding "due diligence" procedural bar in California. Rather the Ninth Circuit's opinion involved a straightforward application of *Chavis* and *Saffold* to determine whether, in this case, the interval between the first and second superior court petitions was reasonable for purposes of interval tolling such that the first petition remained "pending" during that five-month time frame.

By misinterpreting the Ninth Circuit's decision as involving conditions to filing, petitioner claims that the court violated *Artuz* and created a circuit split. However, the Ninth Circuit's opinion has nothing to do with conditions to filing and simply

resolved a question about interval tolling. Petitioner's arguments not only conflate these principles but hinge on supposed findings that the Ninth Circuit did not make. Since the Ninth Circuit did not find that any of the state petitions was not "properly filed" or that a supposed "due diligence" procedural bar was a condition to filing, its decision does not implicate *Artuz*, and there is no resulting circuit split.

Further, the Ninth Circuit did not misapply *Saffold* in relying on the superior court's finding of lack of diligence when it concluded that petitioner's five-month delay was unreasonable such that it did not toll the period of limitation. In any event, this routine application of *Saffold* does not present an important question of law for this Court to decide.

I. Petitioner Is Not Entitled To Interval Tolling Between The First And Second Superior Court Petitions Because They Were Successively Filed In The Same Court

The Ninth Circuit correctly concluded that petitioner was not entitled to tolling during the five-month interval between the first and second superior court petitions. Tolling is not available during that interval because petitioner was not proceeding from a lower court to a higher court.[4]

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[4] The Ninth Circuit declined to decide whether petitioner was entitled to interval tolling between the first and second superior court petitions on the basis that they were successively filed in the same court. *Banjo*, 614 F.3d at 970 ("Because we conclude that [the second superior court] petition is not timely under the second prong of [*King v. Roe*, 340 F.3d 821 (9th Cir. 2003)], we need not determine whether the [second superior court] petition was a continuation of the first or the start of a (continued...)

A. Applicable Law

Pursuant to 28 U.S.C. § 2244(d), a petitioner has one year to file a federal habeas petition under 28 U.S.C. § 2254. The limitation period generally begins to run from the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review. *See* 28 U.S.C. § 2244(d)(1)(A). The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending tolls the one-year period of limitation. *See* 28 U.S.C. § 2244(d)(2).

In California, a state prisoner may file an original habeas petition at any level of the state court system. A petition is timely if it is filed within a reasonable time. *Saffold*, 536 U.S. at 221-23. The only avenue for a petitioner to challenge a petition denied by the superior court is to file a new petition in the court of appeal. In order to challenge the appellate court's ruling, a petitioner may file either an original petition or petition for review in the California Supreme Court. *Saffold*, at 224-25. As a result of this system, there are intervals between habeas petitions during which a petition is not actually pending. In *Saffold*, this Court held that California's system was sufficiently analogous to appellate review systems so that those intervals can be tolled under certain circumstances. *Id.* at 222. Within the meaning of § 2244(d)(2), the term

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(...continued)
second round"). Nevertheless, a prevailing party may defend its judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the courts below." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

"pending" includes the period between a lower court's denial of relief and the filing of a new petition in a higher court, as long as the petitioner does not engage in unreasonable delay between the filings. *Saffold*, 536 U.S. at 223; *see Chavis*, 546 U.S. 189; *Banjo v. Ayers*, 614 F.3d at 968. The Court noted that in most states, a petitioner must file a notice of appeal from a trial court's ruling within 30 or 45 days, and must file a notice of appeal from the appellate court's ruling within a "short period of time" such as "20 or 30 days[.]" *Saffold*, at 219.

An untimely petition is not "properly filed" and therefore does not toll the statute of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). A state court's determination that a petition was not timely filed is the "end of the matter" for purposes of § 2244(b)(2). *Chavis*, 546 U.S. at 207 ("if the state court's untimeliness ruling is clear, 'that would be the end of the matter'"); *Pace*, 544 U.S. at 414 ("What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2).").

For purposes of interval tolling, in the absence of a timeliness ruling by the state court, the federal court must decide for itself whether a state habeas petition in a California appellate court was filed "within what California would consider a 'reasonable time.'" *Chavis*, 546 U.S. at 198. This Court provided the following guidance to a federal court deciding whether a delay was reasonable, as follows:

> [I]n doing so, the [Ninth] Circuit must keep in mind that, in *Saffold*, we held that timely filings in California (as elsewhere) fell within the federal tolling provision on the assumption that

> California law in this respect did not differ significantly from the law of other States, i.e., that California's "reasonable time" standard would not lead to filing delays substantially longer than those in States with determinate timeliness rules. [Citation.]

Id. at 199-200; *see Banjo v. Ayers*, 614 F.3d at 968 ("We cannot infer from a decision on the merits, or a decision without explanation, that the California court concluded that the petition was timely").

Furthermore, a petitioner is not entitled to tolling between different rounds of collateral attack or between habeas petitions successively filed in the same court. Rather, interval tolling is available "between a lower court decision and a filing of a new petition in a higher court[.]" *Saffold*, 536 U.S. at 222-23 (emphasis added); *see Chavis*, 546 U.S. at 193 ("[a]s long as the prisoner filed a petition for appellate review within a 'reasonable time,' he could count as 'pending' . . . the days between (1) the time the lower state court reaches an adverse decision, and (2) the day he filed a petition in the higher state court") (citing *Saffold*, 536 U.S.at 222-23) (emphasis added).

B. Because Petitioner's First Two Petitions Were Not Filed In Ascending Order, Interval Tolling Does Not Apply During The Five-Month Interval Between Them

Here, the California Supreme Court denied review on direct appeal on October 16, 2002. Since petitioner did not seek certiorari, the judgment became final ninety days later, on January 14, 2003. *See* S. Ct. R. 13. Absent tolling, petitioner had until

January 14, 2004, to file the federal petition. *See* §2244(b)(1)(A). Petitioner did not file the federal petition until April 2, 2007, over three years after the statute of limitations expired. Therefore, the petition is time-barred unless petitioner is entitled to sufficient statutory tolling.

Petitioner did not file the first superior court petition until December 30, 2003,[5] after 350 days of the statute of limitations had already expired, leaving only 15 days to file a timely federal petition. The superior court petition was denied on January 28, 2005. Petitioner filed a motion for reconsideration on February 4, 2005, which was denied on February 10, 2005. Petitioner then waited 146 days – about five months – until July 6, 2005, to file a second petition in the same court raising the same claims as his first petition, but attaching what he claimed was newly discovered evidence. The superior court denied the petition on July 27, 2005, after finding that petitioner had failed to exercise diligence. (Cert. Pet. App. at 35a-36a.)

As correctly found by the district court, "Petitioner was not pursuing habeas relief 'up the ladder of the state court system'" (Cert. Pet. App. at 18a). The assumed basis for this Court's conclusion that tolling could be applied to intervals during which no petition is actually pending was that California's unique original jurisdiction system was sufficiently similar to the appellate review systems of other states. *Saffold*, 536 U.S. at 221-23. But that principle does not apply when a petitioner files a successive petition in the same court, which is not

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[5] The "mailbox rule" does not apply as Petitioner was represented by counsel during his post-conviction applications for collateral relief. *Houston v. Lack*, 487 U.S. 266, 276 (1988).

"reviewing" a lower court's ruling. By filing the second petition in the same court that had denied the prior petition, petitioner failed to proceed in ascending fashion, as required by this Court's decisions in *Saffold* and *Chavis*. In addition, interval tolling between successive petitions is inconsistent with the notion that a petitioner is entitled to tolling during "one complete round" of habeas review. *See Id.* at 220.

Because interval tolling is premised on a petitioner proceeding in ascending order through the state court system in order to accomplish one complete round of state postconviction review, tolling is not available for an interval between two petitions filed in the same court. Here, absent tolling during the five-month interval between the first and second superior court petitions, the federal petition is indisputably untimely. Thus, the Ninth Circuit correctly upheld the district court judgment dismissing the petition as untimely. Accordingly, certiorari is unwarranted.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE FIVE-MONTH INTERVAL BETWEEN THE TWO SUCCESSIVE SUPERIOR COURT PETITIONS WAS UNREASONABLE AS A RESULT OF PETITIONER'S LACK OF DILIGENCE

Even assuming that petitioner's failure to pursue relief up the ladder of the state court system did not foreclose interval tolling for the five-month period between his two successive superior court petitions, the Ninth Circuit correctly concluded that petitioner's lack of diligence precludes interval tolling pursuant to *Chavis* and *Saffold*.

This five-month interval greatly exceeds the time allowed by California law for the filing of a

notice of appeal in a criminal proceeding, which is sixty days. *See* Cal. R. Ct. 8.308(a); *see also Chavis*, 546 U.S. at 191-92, 201 (no "gap" tolling permitted where there was at least six months of unjustified delay between the California Court of Appeal's denial of habeas relief and the filing of a habeas petition in the California Supreme Court, as unexplained delay of this magnitude does not fall within the scope of the federal statutory word "pending," and discussing the deadlines typically imposed by most States with determinate time limits for filing a notice of appeal, "such as 30 or 60 days"); *Velasquez v. Kirkland*, __ F.3d __, No. 08-55823, 2011 U.S. App. LEXIS 9502, at *12 (9th Cir. May 10, 2011) (petitioner not entitled to statutory tolling for unjustified intervals of ninety-one days and eighty-one days between state court filings); *Chaffer v. Prosper*, 592 F.2d 1046, 1048 (9th Cir. 2010) (petitioner was not entitled to statutory tolling for the unjustified 115-day and 101-day intervals between his state petitions).

Moreover, as this Court has observed, any substantial delay must be justified under California law for a California habeas petition to be considered timely. *Chavis*, 546 U.S. at 201. Although California's "special system governing appeals when prisoners seek relief on collateral review" (*see id.* at 192) does not proscribe a specific period within which an "appeal" may be taken to a higher state court following the denial of habeas corpus relief, California courts have long required petitioners to "explain and justify any significant delay in seeking" such relief. *In re Clark*, 5 Cal. 4th 750, 765, 21 Cal. Rptr. 2d 509 (1993) (citing *In re Swain*, 34 Cal. 2d 300, 302, 209 P.2d 793 (1949)). "Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the

information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 Cal. 4th 770, 787, 77 Cal. Rptr. 153 (1998). "[A] petition should be filed as promptly as the circumstances allow, and the petitioner 'must point to particular circumstances sufficient to justify substantial delay.'" *In re Clark*, 5 Cal. 4th at 765 n.5 (quoting *In re Stankewitz*, 40 Cal.3d 391, 397 n.1, 220 Cal. Rptr. 382 (1984)). This burden of justification is "applicable to all habeas corpus petitions" and is placed even on indigent prisoners. *In re Clark*, 5 Cal. 4th at 765, 783. The burden is substantial:

> A petitioner does not meet his or her burden simply by alleging in general terms that the claim or subclaim recently was discovered, or by producing a declaration of present or former counsel to that general effect. He or she must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time – and he or she bears the burden of *establishing*, through those specific allegations (which may be supported by relevant exhibits [citation]) absence of substantial delay. [Citation.]

In re Robbins, 18 Cal. 4th at 787-88 (emphasis in original). Where a petitioner fails to make these specific allegations, "he or she has failed to carry the petitioner's burden of establishing that the claim was filed without substantial delay." *Id.* at 787.

Here, as required by *Chavis*, the Ninth Circuit decided "whether the petition at issue was filed

within a 'reasonable time.'" *Banjo*, 614 F.3d at 968. Noting that a state court's determination of untimeliness is dispositive, *id.*, but that the superior court had not explicitly done so here, *id.* at 970, the Ninth Circuit independently decided whether California would consider the five-month interval reasonable. *Chavis*, 546 U.S. at 198 ("In the absence of . . . clear indication that a particular request for appellate review was timely or untimely, the Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness").

Based on the relevant circumstances, the Ninth Circuit concluded that the delay was unreasonable. The court relied, in part, on the magnitude of the delay itself: "Banjo waited 146 days. We cannot conclude that such a delay is reasonable, nor is it consistent with the short periods of time permitted by most states and envisioned by the Supreme Court in reaching its decisions in *Saffold* and *Chavis*." *Banjo*, 614 F.3d at 970.

In addition, the court determined that a California court would not consider the delay reasonable. Notably, in this case, the Ninth Circuit was not faced with a state court's silent denial, but rather, the superior court had already clearly indicated whether California would consider the five-month delay reasonable. *Chavis*, 546 U.S. at 207-08 ("The easiest cases, of course, are those in which the state-court order expressly states that a petition was either untimely or timely. . . . More difficult are those cases in which the state court rules on the merits without any comment on timeliness") (Stevens, J., concurring). Indeed, the superior court expressly found that petitioner could have and should have produced the newly proffered evidence

during the first extensive habeas proceeding with reasonable diligence. (Cert. Pet. App. at 35a-36a.)[6]

Pursuant to *Chavis*, the Ninth Circuit properly relied upon the superior court's findings in deciding whether a *California court* would have considered petitioner's five-month delay reasonable. *Banjo*, 614 F.3d at 971 ("[T]he delay cannot be deemed justifiable. A California court would not have found this delay reasonable."); *Chavis*, 546 U.S. at 198 ("the federal court must decide whether the filing . . . was made within what California would consider a 'reasonable time'").

Petitioner argues that the Ninth Circuit erred in creating an irrebuttable presumption of correctness for state court findings of lack of diligence. (Cert. Pet. at 30-32.) However, as this Court unequivocally held in a different context in *Pace*: "When a postconviction petition is untimely under state law, "that [is] the end of the matter" for

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[6] As the district court explained, petitioner's counsel did not exercise diligence in investigating the three additional witnesses until "*after* the motion for reconsideration" and "there was no reason that Petitioner's counsel could not have been diligent *before* the First Superior Court Petition was denied." (Cert. Pet. App. at 24a, emphasis in original.) The district court aptly observed, "[i]t was Guletta's information that led to the discovery of the three new witnesses. Guletta was known as a witness well before the First Superior Court Petition was ever filed." (Cert. Pet. App. at 24a.) Indeed, Guletta's declaration was signed "three and a half months before AEDPA's statute of limitations began to run and over two years before the investigation leading to the new witnesses began." (*Id.*) Thus, "[t]here [was] no reason why a diligent investigation of the same order as the one that led to the three new witnesses could not have begun before the motion for reconsideration was denied." (*Id.*)

purposes of § 2244(d)(2)." *Pace*, 544 U.S. at 414. Accordingly, it was entirely proper for the Ninth Circuit to rely, at least in part, on the superior court's finding that petitioner failed to exercise reasonable diligence in deciding whether petitioner's five-month delay was reasonable pursuant to *Chavis*.[7]

Given that the Ninth Circuit correctly found that the five-month interval was not reasonable, and properly relied upon the superior court's finding of lack of diligence in doing so, certiorari is unwarranted.

III. BECAUSE THE NINTH CIRCUIT DID NOT FIND A STATE PETITION WAS NOT PROPERLY FILED BASED ON A PROCEDURAL BAR, ITS DECISION DOES NOT IMPLICATE *ARTUZ* OR CREATE A CIRCUIT SPLIT

Petitioner argues that the Ninth Circuit's decision violates *Artuz* and created a circuit split. (Cert. Pet. at 16-30.) Petitioner's argument is based on the false premise that the Ninth Circuit found a state petition was not properly filed on the basis of a state procedural bar. But the Ninth Circuit did not do so. By relying on this false premise, petitioner misapplies the authority defining "properly filed" to a decision construing the definition of "pending." The Ninth Circuit's decision did not rely in any respect on

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[7] The Ninth Circuit construed the superior court's lack of diligence finding as part of the court's ruling on the merits of the new trial motion under California law, which includes a diligence element. If the Ninth Circuit had instead determined that the superior court found the second petition was not timely filed, it would have been beyond cavil that the second petition would not toll the statute of limitations at all. *Pace*, 544 U.S. at 414.

the construction of "properly filed," but rather, simply decided whether the first superior court petition was "pending" until the second petition was filed. Because the Ninth Circuit's decision did not find any petition was not "properly filed," its decision does not even implicate *Artuz*, let alone create a circuit split.

In *Artuz v. Bennett*, 531 U.S. at 4, this Court held that for the purposes of § 2244(d)(2), "[a]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Id.* at 8 (original emphasis omitted). This Court also held that a state court's imposition of a procedural bar does not necessarily mean that the petition was not "properly filed" for purposes of § 2244(d)(2). *Id.* at 9. Rather, "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." *Id.* at 9 (emphasis in original). In so holding, this Court distinguished between "a condition to filing" – which must be satisfied to be eligible for tolling under AEDPA (e.g., a time limitation) – and a "condition to obtaining relief," which need not be satisfied to be eligible for tolling under AEDPA. *Id.* at 11.

In *Pace*, this Court held that a petition denied by a state court as untimely is not "properly filed" for purposes of § 2244(d)(2). As this Court explained, "time limits, no matter their form, are 'filing' conditions." *Pace*, 544 U.S. at 417. Under *Pace*, a petition denied as untimely by California is not properly filed.

Here, although the superior court cited *Clark* in its order (Cert. Pet. App. at 36a), the Ninth Circuit expressly concluded that the superior court did not

find that the petition was untimely filed. *Banjo*, 614 F.3d at 970 ("Here, the superior court did not make a determination that Banjo's second petition was untimely"). This conclusion was supported by the superior court's application of California Penal Code section 1181(8), which governs new trial motions. Under this section, the superior court found that "with reasonable diligence Petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding." (Cert. Pet. App. at 36a.)

Petitioner nonetheless contends that the Ninth Circuit treated a so-called "due diligence" procedural bar imposed by the superior court as a "condition to filing" in contravention of *Artuz v. Bennett*, 531 U.S. 4 (Cert. Pet. at 16-21) thereby creating a conflict with the fifth Circuit's decision in *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999) (Cert. Pet. at 21-23). No such thing happened here, and *Villegas* does not relate to this case.

In *Villegas v. Johnson*, 184 F.3d at 468, the district court dismissed Villegas's federal petition as untimely, finding that his successive state habeas petition had not been "properly filed" and, as a consequence, its pendency had not tolled the federal limitations period. *Id.* On appeal to the Fifth Circuit, Villegas argued that his second state habeas petition was filed in accordance with Texas procedural filing requirements and that the state court's dismissal of that petition as successive had no bearing on whether it was "properly filed." *Id.* at 469. The Fifth Circuit agreed and reversed. The court declined to find that "a successive state application or one containing procedurally barred claims is *per se* improperly filed." *Id.* at 470.

Contrary to petitioner's assertion, the Ninth Circuit did not construe the superior court order as imposing a so-called "due diligence" procedural bar. Indeed, California does not recognize a freestanding "due diligence" procedural bar. Diligence is a component of certain procedural bars, including California's timeliness bar. *In re Clark*, 5 Cal. 4th at 765, 767, 774-75, 783; *In re Robbins*, 18 Cal. 4th at 787. However, there is no "due diligence" procedural bar, and petitioner has not cited any California authority describing such a bar. Further, the Ninth Circuit concluded that "the superior court did not make a determination that [Petitioner's] second petition was untimely" and that "while the superior court rejected the petition, it did not explicitly reject it as untimely filed." *Banjo*, 614 F.3d at 970. In reaching this conclusion, the Ninth Circuit specifically cited *Artuz* to demonstrate the contrast between this case and *Artuz*, which the court described in a parenthetical as "distinguishing between timeliness, which is a condition to filing, and procedural bars, which are conditions to relief[.]" *Id.*

If, as Petitioner insists, the Ninth Circuit had construed the superior court's denial order as raising some sort of "due diligence" procedural bar, and if the Ninth Circuit had treated this procedural bar as a condition to filing, as petitioner claims, the court would have had no reason to engage in the *Chavis* analysis. As this Court explained in *Pace*, "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of statutory tolling. *Pace*, 544 U.S. at 414, quoting *Saffold*, 536 U.S. at 236.

It necessarily follows that petitioner's assertion that the Ninth Circuit's decision, which did not treat a procedural bar as a condition to filing as

petitioner claims, did not create a conflict with the Fifth Circuit's decision in *Villegas v. Johnson*, 184 F.3d at 467. (Cert. Pet. at 21-23.)

As a result, certiorari is not warranted because the circuit split alleged by petitioner is not presented here.

IV. The Independence And Adequacy Requirements Of The Procedural Bar Doctrine Are Not Relevant To Statutory Tolling

Petitioner also claims that certiorari is needed "to resolve a circuit split on whether conditions to filing must be 'firmly established' and 'regularly followed' before they may be invoked to preclude tolling under AEDPA." (Cert. Pet. at 23, original capitalization and boldface omitted.) Petitioner argues that this "Court has not previously decided whether procedural default standards apply when noncompliance with a state "condition to filing" is invoked to bar federal habeas review under AEDPA's statute of limitations." (Cert. Pet. at at 24.) Petitioner's argument is again premised on his misinterpretation of the Ninth Circuit's decision as involving a "condition to filing." Since it did not, Petitioner's argument is inapposite.

Nevertheless, although it is not an issue here, a California court's finding of untimeliness so as to render a state petition not properly filed within the meaning of § 2244(b)(2), need not meet the independence and adequacy requirements of the procedural bar doctrine. Indeed, those requirements are entirely irrelevant to the statutory tolling analysis. As this Court made unmistakably clear in *Pace* and *Saffold*, a California court's determination that a state habeas petition is untimely under state

law is the "end of the matter" for purposes of § 2244(b)(2). *Pace v. DiGuglielmo*, 544 U.S. at 414; *Carey v. Saffold*, 536 U.S. at 226; *see also Artuz*, 531 U.S. at 10-11 (distinguishing between timeliness, which is a condition to filing, and procedural bars, which are conditions to relief); *Zepeda v. Walker*, 581 F.3d 1013, 1018 (9th Cir. 2009) ("Supreme Court precedent indicates that whether a condition to filing is firmly established and regularly followed is irrelevant").

Furthermore, even assuming arguendo that such conditions could be applied in the statutory tolling context, in *Walker v. Martin*, 131 S. Ct. 1120, 1131, 179 L. Ed. 2d 62 (2011), this Court held that California's timeliness bar was adequate. The Ninth Circuit has held that the bar is independent of federal law. *Bennet v. Mueller*, 322 F.3d 573, 579-81 (9th Cir. 2003). Consequently, even if it were relevant to this case, California's timeliness bar is independent and adequate.

Accordingly, certiorari is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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